

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL STAMP NO.22299 OF 2007

WITH

CIVIL APPLICATION NO.678 OF 2008

MARKS PRASAD DETHE

APPLICANT

VERSUS

GEORGE PREMCHAND DETHE

RESPONDENT

Mr.P.B.Shirsath, Advocate for the applicant.

Mr.R.R.Karpe, Advocate for respondent Nos. 1-A and 1-B.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 23/04/2015

PER COURT :

1. The civil application preferred by the applicant (original defendant No.2) suffers from delay of 1799 days in filing the second appeal. Since I had indicated to the learned Advocates that the civil application would be heard alongwith the second appeal, both have graciously made their submissions on the application as well as the second appeal.

2. The applicant/appellant indicated that he was residing at

Nasik and in August 2007, he was informed by the Gram Sevak that the Appeal Court had delivered its judgment on 27/09/2002 in favour of the original plaintiff, that the appellant gathered knowledge about the impugned judgment. It is stated that the delay is neither intentional nor deliberate.

3. Mr.Karpe, learned Advocate has vehemently opposed the application. He submits that the delay is of about 6 years. The appellant has been negligent throughout. He did not file his written statement in RCS 88/1995, did not lead evidence and despite appearing in RCA No.290/2000, the matter went unattended.

4. Considering the above and the fact that the delay does not appear to be intentional or deliberate, the civil application is allowed. Delay is condoned subject to payment of costs of Rs.5,000/- (Rs. Five thousand only). Costs to be deposited in this Court within 6 (six) weeks from today and the legal heirs of the original plaintiff on record may withdraw the same in equal proportions. Failure to deposit the costs as directed would result in recalling this order and the civil application would then stand rejected.

5. While hearing this matter, I have made an endeavour to assess

the interest of the appellant in these proceedings. Therefore, considering the submissions of Mr.Karpe and taking into account that a remand of the proceedings would reverse the clock of litigation by about 20 years, I had recorded the contention of Mr.Karpe that if the request of the appellant is accepted, then costs of Rs.1,00,000/- be imposed on the appellant as the original plaintiff would have to undergo the rigours of litigation which he has already undergone in the past 20 years. Today, when the matter was heard, Mr.Shirsath has categorically stated that his client was not inclined to pay costs more than Rs.5,000/-.

6. This matter was heard at length on 08/04/2015. The following order was passed on 08/04/2015 :-

"1. The second appeal alongwith the civil application, by consent of the parties, was considered on 01/04/2015. I have heard the learned Advocates for the respective sides on the main matter for quite some time today.

2. The appellant is aggrieved by the judgment dated 27/09/2002 delivered by the Appeal Court in RCA No.290/2000. The said appeal was preferred by the respondent/original plaintiff being aggrieved by the judgment of the Trial Court dated 06/10/1999, dismissing RCS No.88/1995 despite the appellant herein having not filed the written

statement and having failed to bring any evidence on record. Mr.Karpe, learned Advocate submits that the suit was decided ex-parte.

3. Mr.Shirsath, learned Advocate submits that the appellant is willing to bear any amount of costs if the matter is remanded to the Appeal Court to re-hear RCA No.290/2000 since the said appeal has been decided virtually ex-parte. Mr.Karpe submits that the suit before the Trial Court could be considered rather than remanding the matter to the Appeal Court. He, however, submits that since the appellant desires to reverse the clock of litigation by 15-20 years, costs of Rs.1,00,000/- be imposed on the appellant.

4. I find that the appellant had not led any evidence before the Trial Court. Since he had not raised any defence, the Appeal Court will have to decide the appeal only on the basis of the oral and documentary evidence and the pleadings of the original plaintiff, if this appeal is allowed.

5. Mr.Shirsath, therefore, prays for an adjournment to take instructions as to whether the appellant/original defendant is inclined to go before the Trial Court and file his written statement as well as lead evidence or as to whether the appellant is satisfied with participating only in RCA No.290/2000 and does not desire to lead any evidence in the matter.

6. *Stand over to 23/04/2015."*

7. Mr.Shirsath, learned Advocate, on instructions, submits that the appellant/original defendant is not willing to pay costs and this matter may therefore be decided on its own merits.

8. RCS No.88/1995 was filed by the respondent herein (hereinafter referred to as the 'plaintiff'). The plaintiff had sought perpetual injunction and possession of the suit property as against two defendants inclusive of the appellant (hereinafter referred to as the 'defendant').

9. The plaintiff had contended that the suit property Gram Panchayat House No.283 in village Pokhardi was owned and possessed by the plaintiff's uncle Prasad Tukaram. He was unmarried. He passed away without living Class-I heirs. The plaintiff claimed to be the legal representative of the deceased Prasad Tukaram. He claimed to have become the absolute owner of the suit property after his demise.

10. It was claimed by the plaintiff that he was residing alongwith his sons at Ahmednagar since 1990 and the defendant took

disadvantage of this fact and illegally took the possession of the suit property. Defendant No.1 constructed a portion on the suit property under the instigation of defendant No.2, who is the appellant herein.

11. It was sought to be canvassed before the Trial Court that the appellant was the son of the mistress of the deceased Prasad Tukaram. They are now trying to grab the property. As such, perpetual injunction was prayed for and the plaintiff sought possession of the suit property. It is conceded that the defendant did not file a written statement in the suit and did not lead any evidence. By judgment and order dated 06/10/1999, the suit was dismissed.

12. The plaintiff preferred Reg.Civil Appeal No.290/2000 before the Appeal Court. Both the defendants appeared in the proceedings through an Advocate. The Appeal Court has recorded in paragraph No.3 of the judgment dated 27/09/2002, impugned in this appeal, that the defendants were duly served, yet they did not enter their appearance. It is clarified by Mr.Shirsath that a practicing Advocate had appeared on behalf of the defendants in the appeal before the Lower Court. However, he was absent when the appeal was finally heard.

13. While hearing the matter on its merits, it is apparent that the

original defendants were neither keen in filing their written statement nor did they confront the plaintiff on his evidence, in as much as they themselves did not choose to cause any assistance to the Trial Court. Similar was the case before the Appeal Court. In this circumstances, I do not find that this is a fit case for remand.

14. It is pertinent to note that neither any written statement was filed by the defendants, nor did they confront the plaintiff on his oral and documentary evidence. Similarly, they did not contest the suit. It was in this backdrop that the Appeal Court considered the entire record and proceedings. The appeal was registered on 25/09/2000. It was decided on 27/09/2002.

15. The Appeal Court, while assessing the oral and documentary evidence, has gone through the CTS extract of the house property. It has considered the evidence recorded by the plaintiff who stepped into the witness box. The record as regards the house property in the form of the property card and the documents at Exh.27 and 28 were considered. The Appeal Court, therefore, came to a conclusion that there was no evidence to indicate the reasons and circumstances in which the defendants acquired the possession of the house property. The record indicates the right, title and interest of the

plaintiff as a co-owner of the house property alongwith his brothers Wilson, William, George and Albert.

16. The Appeal Court, on the basis of evidence, therefore, came to a conclusion that there was no evidence to establish the right, title or interest of the defendants in the suit property, in as much as, the circumstances by which they have acquired the possession of the property. It was, in this backdrop, that the Appeal Court came to a conclusion that the lawful possession of the suit property by the defendants is not proved.

17. While considering the strenuous submissions of the learned Advocate for the appellant, I do not find any pleading even in the Appeal Memo so as to indicate as to what was the evidence with the appellant to establish his lawful possession. Barring a statement that the house property was purchased by his father and thereafter it was transferred in the name of his mother, there is nothing placed on record to support the said contention or to indicate that the appellant/original defendant has any right, title or interest over the suit property.

18. In the light of the above, I do not find that any substantial

question of Law emerges in this second appeal. The same, being devoid of merit, is therefore, dismissed.

19. No costs.

(RAVINDRA V. GHUGE, J.)